



REPUBLIC OF KENYA



KENYA LAW
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**Mokua v Abuga & 2 others (Environment and Land Miscellaneous Application
E001 of 2022) [2022] KEELC 2965 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2965 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2022
JM ONYANGO, J
MAY 26, 2022**

BETWEEN

RACHEL MORAA MOKUA APPLICANT

AND

DINAH ORIBO ABUGA 1ST RESPONDENT

MAISIBA ORIBO ABUGA 2ND RESPONDENT

JEREMIAH MORANG'A AONDO 3RD RESPONDENT

RULING

Introduction

1. The applicant filed a notice of motion dated January 21, 2022 pursuant to section 1A, 1B and 18 of the *Civil Procedure Act*, cap 21 of the Laws of Kenya and order 51 rule 1 of the *Civil Procedure Rules*, section 13 of the *Environment and Land Court Act* 2011, section 38(1) of the *Limitation of Actions Act* and all enabling provisions of the law seeking the following orders:
 - a) Spent
 - b) That this honourable court be pleased to stay further proceedings in Kisii Chief Magistrates ELC Case No 308 of 2018 pending the hearing and determination of this application.
 - c) That this honourable court be pleased to transfer Kisii Chief Magistrates ELC Case No 308 of 2018 to this court for trial and disposal by a court of competent jurisdiction.
 - d) That the costs of this application be provided for.
2. The application is based on the grounds set out on the face of the notice of motion. The said grounds are that the applicant amended her plaint to include a prayer for a declaration that she has acquired title to all that parcel of land known as Nyaribari Masaba/kiamokama/747 by way of adverse possession



and that the title held by Oribo Abuga has been extinguished in favour of the plaintiff by operation of sections 7, 13 and 17 of the *Limitation of Actions Act*, chapter 22 of the Laws of Kenya. As a result of the said amendment the subordinate court has no jurisdiction to hear the matter and therefore the same should be transferred to this court for trial and disposal. The application is also supported by the affidavit of Wilfred Nyaundi Konosi, the plaintiff's advocate, sworn on the January 21, 2022 in which he reiterates the reasons for the application.

3. In response to the application, the respondents filed a notice of preliminary objection dated February 21, 2022 in which they stated that the applicant had admitted that the suit before the lower court was incompetent and hence this court has no jurisdiction to transfer an incompetent suit.
4. The court directed that the preliminary objection and application be disposed of by way or written submissions and both parties filed their submissions.
5. The singular issue for determination is whether this court has jurisdiction to transfer ELC Case No 308 of 2018 to this court for trial and disposal.

Analysis And Determination

6. It is necessary to give the background of this case in order to put the matter into perspective. The plaintiff filed this suit on May 31, 2017 claiming she is the registered owner of land parcel number Nyaribari Masaba/kiamokama/748 (the suit property) measuring approximately 1.0 hectare. The said parcel of land was registered in the name of the plaintiff through transmission. The plaintiff claimed that the 1st and 2nd defendants are the widow and son to one Oribo Abuga - deceased who passed away on the May 24, 2017. It was the plaintiff's case that on or about the May 24, 2017, the defendants without any colour of right whatsoever, entered the suit property and started constructing a structure thereon in preparation for interring the remains of the deceased - Oribo Abuga. The plaintiff therefore prayed for a declaration that she is the registered owner of parcel number Nyaribari Masaba/kiamokama/748 and a permanent injunction restraining the defendants from interring the remains of Oribo Abuga on the suit property.
7. Together with the plaint, the plaintiff filed an application for injunction restraining the defendants from interring the remains of Oribo Abuga on the suit property pending the hearing and determination of the main suit. On May 31, 2017 Justice Mutungi J certified the application as urgent and granted a temporary injunction restraining the defendants from removing the remains of the deceased from Nyamache Level Five Hospital Mortuary and interring the same on land parcel number Nyaribari Masaba/kiamokama/748 pending the hearing of the application *inter partes*.
8. The application was fixed for *inter partes* hearing on June 14, 2017. When the matter came up for *inter partes* hearing on June 14, 2017, Mr Mokuia learned counsel for the defendants informed the court that he had just been instructed to act for the defendants and he asked for time to file the response to the application. The court granted the defendants 15 days to file their response and fixed the application for hearing on July 19, 2017 and extended the interim orders.
9. On July 19, 2017, Mr Ogari, learned counsel for the plaintiff informed the court that he had just been served with the defendants' response to the application and he needed time to peruse the same. The application was put off to October 10, 2017 and the interim orders were extended.
10. On October 10, 2017, the plaintiff's counsel was absent but the respondents were represented by Mr Magara who held brief for Mr Mokuia. The application was fixed for mention on October 21, 2017. The interim orders were extended and the application was fixed for mention on October 24, 2017.



11. When the matter came up for mention on October 24, 2017, the court observed that the plaintiff was claiming land parcel number 748 where she averred that the defendants intended to bury the deceased. He further noted that the defendants were claiming that the deceased was the owner of parcel number 747 and there was a search certificate in the name of the deceased. He therefore noted that the issue in dispute was whether parcels number 748 and 747 were separate and distinct. He then directed the Land Registrar and County Surveyor Kisii county to visit the two parcels of land and identify and delineate the physical boundaries of land parcels number Nyaribari Masaba/kiamokoma/747 and 748 and file a report in court within 30 days. The matter was fixed for mention on November 28, 2019 and the interim orders were extended.
12. Since the court did not sit on November 28, 2017, the file was placed before Justice Ong'ondo of Migori ELC for purposes of extending the interim orders. He extended the interim orders and fixed the matter for mention on January 16, 2018. The matter was subsequently mentioned in the registry on February 27, 2018 when it was fixed for mention on April 19, 2018. However, on March 1, 2018 counsel for the plaintiff had the matter mentioned before Justice Mutungi and had the interim orders extended to April 19, 2018.
13. On April 19, 2018 the matter was mentioned before the judge but the Land Registrar's report had not yet been filed. The matter was fixed for mention on June 19, 2018 and the interim orders were extended. On June 19, 2018 the county surveyor attended court and presented their report. The court directed that the parties be furnished with a copy of the report. The case was fixed for mention on July 31, 2018 and the interim orders were extended.
14. On July 31, 2018 the court noted that the report had indicated that the exercise had not been completed due to harsh weather conditions and hostility on the ground. The court therefore directed that the land registrar and county surveyor revisit the suit properties and file a supplementary report. The matter was slated for mention on November 22, 2018. There was no mention of the interim orders.
15. When the matter came up for mention on November 22, 2018, the court lamented that the non-implementation of the order by the land registrar and county surveyor was delaying the matter yet burial could not take place until the boundaries were delineated. The court then noted that the matter could be handled by the Magistrates' Court and proceeded to transfer the case to the Magistrate's Court for hearing and determination. After the case was transferred to the lower court it was given the no CMELC Case No 308 of 2018.
16. The matter was first mentioned before Hon S K Onjoro SRM on the January 9, 2019 when counsel for the plaintiff appeared in the absence of counsel for the defendants and applied for extension of the interim orders. Thereafter the matter was mentioned on various dates between January 2019 and April 20, 2021 when it was fixed for hearing of the main suit. However, the last time the interim orders were extended was on November 12, 2019. On this date, the hearing did not take place as counsel for the plaintiff was engaged in another hearing in the Court of Appeal.
17. The case was subsequently fixed for hearing on August 10, 2021 when plaintiff testified. Before the second witness could be called, counsel for the plaintiff pointed out that the defendants had filed their defence and counterclaim out of time on February 14, 2020 and they had not served him with the same. They had also not served counsel for the plaintiff with their bundle of documents. Counsel for the plaintiff said he did not want to apply for the defence and counterclaim to be struck but he requested the court to give directions.
18. In its ruling dated August 24, 2021 the court gave the following directions:
 - i. "That the proceedings in this case be typed all the way from the High Court (sic)



- ii. That the defence and counterclaim filed be deemed to be properly on record considering the nature of the case, land.
 - iii. That the parties do exchange all documents they intend to rely on within 30 days from today's date.
 - iv. Parties to exchange their pleadings since one says he does not have them.
 - v. The case to start afresh.
 - vi. Mention on October 5, 2021 to confirm compliance”
19. Pursuant to the above directions, the plaintiff filed an amended complaint on December 8, 2021 in which she introduced a new claim for adverse possession in respect of land parcel number Nyaribari Masaba/kiamokama/747. She consequently sought the following reliefs:
- a) A declaration that the plaintiff is the sole registered and lawful owner of LR No Nyaribari Masaba/kiamokama/748 and the beneficial owner of all that parcel of land known as Nyaribari Masaba/kiamokama/747.
 - b) In the alternative, a declaration that the plaintiff has acquired title to all that parcel of land known as Nyaribari Masaba/kiamokama/747 by way of adverse possession and that the title held by Oribo Abuga has been extinguished in favour of the plaintiff by operation of sections 7, 13, and 17 of the *Limitation of Actions Act*, chapter 22 of the Laws of Kenya.
 - c) An order of permanent injunction to issue restraining the defendants by themselves, their agents, servants and or anyone claiming through them from entering, encroaching, building structures or in any manner whatsoever dealing with the suit property and interring the remains of the deceased Oribo Abuga on LR No Nyaribari Masaba/kiamokama/748 and all that parcel of land known as Nyaribari Masaba/kiamokama/747.
 - d) An order that the defendants do remove themselves from all those parcels of land known as Nyaribari Masaba/kiamokama/747 and Nyaribari Masaba/kiamokama/748 and in default they be forcefully evicted.
 - e) An order directing the Kisii county Land Registrar to register all that parcel of land known as Nyaribari Masaba/kiamokama/747 in the name of the plaintiff.
 - f) Costs of this suit be borne by the defendants.
 - g) Any other relief that this honourable court may deem fit and expedient to grant.
20. Together with the amended complaint, the plaintiff filed her reply to the defence and defence to the counterclaim dated December 1, 2021, a list of the plaintiffs' witnesses and witness statements as well as the plaintiff's list and bundle of documents also dated December 1, 2021.
21. On January 27, 2022, a day before the hearing of the suit in the Magistrate's Court, the plaintiff filed the instant application under certificate of urgency seeking *inter alia*, a stay of proceedings in CMELC Case No 308 of 2018 and transfer of CMELC Case No 308 of 2018 to this court for trial and disposal.
22. It is against the foregoing background that I shall consider the merits of the preliminary objection, but before I do that, let me mention three salient points: Firstly, I have carefully read the court's ruling dated August 24, 2021 and nowhere is it stated that the parties are granted leave to amend their pleadings. The only reference to pleading and exchange of documents is found at direction no 3 and 4 which state as follows:



3. “That the parties do exchange all documents they intend to rely on within 30 days from today’s date.
4. Parties to exchange their pleadings since one says he does not have them.”
23. It would appear that learned counsel for the plaintiff mistook the above 2 directions to mean that the pleadings had been reopened to allow for amendment of pleadings. With greatest respect to counsel, this was a gross misdirection as no such order was granted by the court.
24. Secondly, the fact that the application was made under certificate of urgency a day before the hearing date speaks volumes. As fate would have it, I was on annual leave and the application was sent to the ELC judge in Migori by email. Since he did not have the benefit of perusing the lower court file, he gave an *ex-parte* order staying the proceedings in the lower court pending the hearing and determination of this application *inter partes*.
25. Thirdly, this being a burial dispute where both parties and their counsels are aware that there is a body that has been lying in the morgue since May 2017, I am rather perturbed by the pace at which they have chosen to prosecute this matter.
26. Having said that, I will now proceed to consider the preliminary objection. The objection has been raised on the ground that this court has no jurisdiction to transfer a suit that is before a court that is not competent to hear the suit. In this instance, learned counsel for the defendants contends that since the amended plaint has included a claim for adverse possession, the lower court cannot hear the matter. Granted that section 9 of the *Magistrates’ Courts Act* was amended to allow Magistrates Courts to hear and determine land cases subject within the limit of their pecuniary jurisdiction, section 38 of the *Limitation of Actions Act* provides that:

“section 38 “Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as the proprietor of the land”
27. From the above provision of the law, it is clear that anyone who claims land by way of adverse possession ought to file their case in the High Court.
28. Back to the question of transfer, learned counsel for the defendants has contended that this court cannot transfer a case that was filed in a court without jurisdiction. He has relied on Civil Appeal No 244 of 2010 *Phoenix E A Assurance Company Limited v S M Thiga T/A Newspaper Service* where the Court of Appeal held as follows:

“It is clear from the foregoing that the claim by the respondent was filed by a court devoid of jurisdiction. The suit was a nullity *ab initio* and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately all orders emanating from that suit are null and void. Civil Appeal No 6 of 2018 Phoenix E A Assurance Company Limited v S M Thiga T/A Newspaper Service is therefore a nullity as was based on a nullity”
29. Similarly, the plaintiff’s suit contained in the amended plaint cannot be transferred to this court as it was filed in a court without jurisdiction. I am not persuaded by the argument by counsel for the plaintiff that the court needs to consider evidence in order to discern whether the amended plaint raises a claim for adverse possession as it arises from the plaintiff’s amended plaint.



30. In view of the foregoing and considering that the purported amendment was not sanctioned by the court, the preliminary objection has merit and I uphold it and dismiss the application dated May 21, 2022 with costs to the defendants. For the avoidance of doubt the order of stay of proceedings is hereby vacated.
31. In the interest of justice, I direct that this case which has dragged in court despite the fact that there is a body that has been lying in the morgue for six years be heard and concluded within the shortest time possible.

DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF MAY, 2022.

J.M ONYANGO

JUDGE

